Duquesne Law Review

Volume 31 | Number 4 Article 15

1983

Constitutional Law - Searches and Seizures - Roadblocks

Martin R. Egna

CONSTITUTIONAL LAW—SEARCHES AND SEIZURES—ROADBLOCKS—The Pennsylvania Supreme Court has held that systematic, nondiscriminatory, non-arbitrary roadblocks conducted by the police to maintain highway safety by disclosing license, registration, and equipment violations do not offend the Pennsylvania Constitution.

Commonwealth v Blouse, 531 Pa 167, 611 A2d 1177 (1992).

During the evening of August 20, 1987, the Penn Township Police Department ("the police") conducted a traffic-check roadblock in York County, Pennsylvania, to detect license, registration, and equipment ("status") violations.[1] The police shift commander authorized the roadblock in accordance with written department policy and section 6308(b) of the Pennsylvania Vehicle Code.[2] The shift commander determined the location of the roadblock based on previous department experience, which showed a high incidence of status violations while performing routine stops in the evening on a particular road.[3] Pursuant to department policy and the Vehicle Code, the police positioned warning flares, traffic cones, and police units on both sides of the highway and stopped every car in both directions.[4] An officer stopped Michael G. Blouse ("the defendant") at the checkpoint, discovered his operating privilege was suspended, and cited him for the violation.[5]

---

1. *Commonwealth v Blouse*, 102 York Legal Rec 62 (Pa Com Pl, York Cty 1988), aff'd, 390 Pa Super 650, 561 A2d 816 (1989), aff'd, 531 Pa 167, 611 A2d 1177 (1992).

2. *Commonwealth v Blouse*, 531 Pa 167, 611 A2d 1177, 1180 (1992). Section 6308(b) of the Pennsylvania Vehicle Code provides:

> Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has articulable and reasonable grounds to suspect a violation of this title, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa Cons Stat Ann § 6308(b) (Purdon 1977 & Supp 1992).

3. *Blouse*, 611 A2d at 1180.

4. *Blouse*, 102 York Legal Rec at 62.

5. Id. Section 1543(a) of the Pennsylvania Vehicle Code provides, in pertinent part, that:

> any person who drives a motor vehicle on any highway or trafficway of this Commonwealth after the commencement of a suspension, revocation or cancellation of the operating privilege and before the operating privilege has been restored is guilty of a summary offense and shall, upon conviction, be sentenced to pay a fine of $200.

75 Pa Cons Stat Ann § 1543(a) (Purdon 1977 & Supp 1992). The defendant was also cited for an expired vehicle registration, pursuant to section 1301 of the Vehicle Code, which was

In a hearing before the district magistrate,[6] the defendant moved to dismiss the charge[7] and argued that the statute authorizing systematic vehicle-checking programs and the manner in which the police conducted this roadblock violated Article I, section 8 of the Pennsylvania Constitution.[8] The district magistrate deferred the motion to dismiss until necessary testimony was presented at trial before the Court of Common Pleas of York County, Pennsylvania,[9] where the defendant was convicted of the summary offense.[10]

On appeal to the court of common pleas, the defendant's motion to dismiss was denied and he was found guilty of driving while his operating privilege was suspended[11] and fined two-hundred dollars.[12] Looking to the dicta of *Commonwealth v Tarbert*,[13] the trial

---

not at issue. *Blouse*, 102 York Legal Rec at 62.

6. Id.

7. Brief for Appellant at 2, *Blouse*, 611 A2d 1177 (1992). Rule 90 of the Pennsylvania Rules of Criminal Procedure provides:

> A defendant shall not be discharged nor shall a case be dismissed because of a defect in form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of this Chapter, unless the defendant raises the defect before the conclusion of the summary trial and the defect is prejudicial to the rights of the defendant.

PaRCrP 90.

8. *Blouse*, 611 A2d at 1178. Article I, section 8 of the Pennsylvania Constitution provides:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa Const, Art I, § 8.

9. Rule 86(f) of the Pennsylvania Rules of Criminal Procedure, Appeals From Summary Judgments, in pertinent part, provides: "When a defendant appeals after a conviction by an issuing authority in any summary proceeding, . . . the case shall be heard *de novo* by the appropriate division of the court of common pleas as the present judge shall direct." PaRCrP 86(f) (emphasis added).

10. *Blouse*, 102 York Legal Rec at 62. Section 106(c) of the Pennsylvania Crimes Code provides:

> An offense defined by this title constitutes a summary offense if:
>
> (1) it is so designated in this title, or in a statute other than this title; or
>
> (2) if a person convicted thereof may be sentenced to a term of imprisonment, the maximum of which is not more than 90 days.

18 Pa Cons Stat Ann § 106(c) (Purdon 1983).

11. 75 Pa Cons Stat Ann § 1543 (Purdon 1977 & Supp 1992).

12. *Blouse*, 102 York Legal Rec at 65. At the hearing on the motion to dismiss, the defendant stipulated that he was, in fact, driving under a suspended license, and later defendant's counsel agreed that if the motion was dismissed he could be found guilty of the offense. Id.

13. 517 Pa 277, 535 A2d 1035 (1987). The *Tarbert* court framed the issue as whether systematic roadblocks conducted to stop and observe drivers to determine if they are driving under the influence of alcohol is constitutional under Article I, Section 8 of the Pennsylvania Constitution or, alternatively, whether such roadblocks are unlawful because they lack

court held that the Supreme Court of Pennsylvania impliedly found the newly amended section 6308(b) of the Vehicle Code[14] constitutional under Pennsylvania's police powers[15] rather than under the search and seizure provision[16] of the Pennsylvania Constitution.[17] The trial court limited the defendant's constitutional challenge of the statute to whether the legislature exceeded the scope of the Commonwealth's police powers.[18] The court, subsequently, found the statutorily authorized actions were within the scope of such powers.[19] However, in evaluating the manner in which the police conducted the roadblock, the trial court looked to the search and seizure provision of the Pennsylvania Constitution[20]

---

statutory authorization. *Tarbert*, 535 A2d at 1037.

At the time of the roadblocks in controversy in *Tarbert*, the language of section 6308(b) of the Vehicle Code prior to the 1985 amendment controlled (see note 14 for statutory language). In *Tarbert*, the court found that under the express language of the pre-1985 statute, a police officer must have "articulable and reasonable grounds to suspect" a Vehicle Code violation. Id at 1044. Therefore, the court concluded, in *Tarbert*, that vehicle stops at the roadblock, made without probable cause, were unlawful. Id at 1045.

Referring to the amended statute, which was not at issue, the *Tarbert* court proffered that the state, under its police powers, may conduct systematic roadblocks substantially complying with stated guidelines to reduce the intrusiveness of a drunk-driver roadblock to a constitutionally acceptable level. Id at 1043, 1045. See note 127 for the *Tarbert* guidelines.

14. As indicated by The Laws of the Commonwealth of Pennsylvania, the 1985 amendment affected section 6308(b) of the Vehicle Code as follows:

> Whenever a police officer ***is engaged in a systematic program of checking vehicles or drivers or*** has articulable and reasonable grounds to suspect a violation of this title, he may stop a vehicle, upon request or signal, for the purpose of [**inspecting the vehicle as to its equipment and operation, or**] ***checking the vehicle's registration, proof of financial responsibility,*** vehicle identification number or engine number ***or the driver's license,*** or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa Cons Stat Ann § 6308(b) (Purdon 1977 & Supp 1992) (bracketed language removed and italicized language added by Amendment of June 19, 1985. 1985 Pa Laws 20, § 10).

15. *Black's Law Dictionary* defines "police power" as:

> [a]n authority conferred by the . . . Tenth Amendment [of the United States Constitution] upon the individual states, and, in turn, delegated to local governments, through which they are enabled to establish a special department of police; adopt such laws and regulations as tend to . . . secure generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order, preventing the conflict of rights in the public intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him or her by the general laws. . . . The police power is subject to limitations of the federal and state constitutions, and especially to the requirement of due process.

Black's Law Dictionary 1156 (West, 6th ed 1990).

16. Pa Const, Art I, § 8.

17. *Blouse*, 102 York Legal Rec at 63.

18. Id.

19. Id at 64.

20. Pa Const, Art I, § 8.

and employed an interest-balancing analysis gleaned from *Tarbert*.[21] The court balanced the state's compelling interest in maintaining highway safety against the intrusiveness of traffic-check roadblocks on the individual's privacy interest.[22] Finding that status offenses under the Vehicle Code are not detectable by a more traditional and less intrusive means,[23] and that the police substantially complied with the *Tarbert* guidelines,[24] the court held that the manner in which the police conducted the traffic-check roadblock was constitutional under Article I, section 8 of the Pennsylvania Constitution.[25]

The defendant filed post-verdict motions[26] in the form of a motion in arrest of judgment[27] and a motion for a new trial,[28] which were overruled and dismissed.[29] On appeal, the Superior Court of Pennsylvania affirmed the trial court's decision per curium.[30]

---

21. *Blouse*, 102 York Legal Rec at 63-64.

22. Id at 64.

23. Id.

24. Id at 65. See note 127 for the *Tarbert* guidelines.

25. *Blouse*, 102 York Legal Rec at 65.

26. Rule 1123(a) of the Pennsylvania Rules of Criminal Procedure provides:

> Within ten (10) days after a finding of guilt, the defendant shall have the right to file written motions for a new trial and in arrest of judgment. Only those grounds may be considered which were raised in pre-trial proceedings or at trial, unless the trial judge, upon cause shown, allows otherwise. Argument, a hearing, or both shall be scheduled and heard promptly after such motions are filed, and only those issues raised and the grounds relied upon in the motions that are stated specifically and with particularity may be argued or heard.

PaRCrP 1123(a).

27. Rule 1124(a) of the Pennsylvania Rules of Criminal Procedure provides, "[a] defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged by a: . . . (4) motion in arrest of judgment filed within ten (10) days after a finding of guilt." PaRCrP 1124(a).

28. Section 135:188, Motions for New Trial, in Standard Pennsylvania Practice provides:

> The granting of a new trial in a criminal case is within the court's discretion, and is not foreclosed by a decision on a motion to arrest judgment. Moreover, the court has the power to treat a motion for a new trial as a motion in arrest of judgment where the facts in the case support the latter motion.
>
> In considering whether to grant a motion for a new trial, the court must view the evidence in the light most favorable to the Commonwealth.

Conduct of Criminal Trial, 27 Std Pa Prac § 135:188 (Law Co-op, 1985).

29. *Commonwealth v Blouse*, No 314 SCA 1987 (Pa Com Pl, York Cty, August 16, 1988).

30. *Commonwealth v Blouse*, 390 Pa Super 650, 561 A2d 816 (1989) (unpublished opinion), aff'd, 531 Pa 167, 611 A2d 1177 (1992). The Pennsylvania Rules of Court for the superior court provides:

> An unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding except that such a memorandum decision may be relied upon or cited (1) when it is relevant under the doctrine of law of the

The Supreme Court of Pennsylvania granted the defendant's petition for allowance of appeal[31] and affirmed the order of the superior court.[32] Justice Larsen formulated the issue before the court as whether the use of systematic, non-discriminatory, non-arbitrary roadblocks is constitutional under Article I, section 8 of the Pennsylvania Constitution,[33] when used to discover status violations to ensure safety on the Commonwealth's highways.[34] Recognizing that stopping a vehicle and detaining its occupants is an undisputed seizure subject to constitutional restraints, the supreme court employed an interest-balancing analysis to determine whether the systematic roadblock was an unreasonable search and seizure prohibited by the Pennsylvania Constitution.[35]

The court turned its focus to the application of interest balancing in *Tarbert*[36] and, while acknowledging the plurality of that decision, held that it provided significant authority for the case at bar because four justices expressed their view that systematic roadblocks are constitutional.[37] Adopting the guidelines set forth in *Tarbert* to ensure that an individual's reasonable expectation of

---

case, res judicata, or collateral estoppel, and (2) when the memorandum is relevant to a criminal action or proceeding because it recites issues raised and reasons for a decision affecting the same defendant in a prior action or proceeding. When an unpublished memorandum decision is relied upon pursuant to this rule, a copy of the memorandum must be furnished to the other party and to the Court.

Pa Rules of Court, State, § 65.37 (West 1992).

31. *Commonwealth v Blouse*, 524 Pa 624, 574 A2d 66 (1990). "[F]inal orders of the Superior Court . . . may be reviewed by the Supreme Court upon allowance of appeal by any two justices of the Supreme Court upon petition of any party to the matter." Judiciary and Judicial Procedure, 42 Pa Cons Stat Ann § 724(a) (Purdon 1981).

32. *Blouse*, 611 A2d at 1181. The case was heard before Chief Justice Nix and Justices Larsen, Flaherty, McDermott, Zappala, Papadakos, and Cappy. Id at 1178. Justice Larsen delivered the opinion of the court. Justice Papadakos, joined the majority opinion and also filed a concurring opinion. Justice Flaherty, with whom Justices Zappala and Cappy joined, filed a dissenting opinion. Justice Zappala, with whom Justices Flaherty and Cappy joined, also filed a dissenting opinion. Id at 1181.

33. See note 8 for the pertinent text.

34. *Blouse*, 611 A2d at 1178.

35. Id. The supreme court stated that, in *Commonwealth v Johnston*, 515 Pa 454, 530 A2d 74 (1987), the court determined the constitutionality under the Pennsylvania Constitution of warrantless canine-sniff searches based on less than probable cause. *Blouse*, 611 A2d at 1178-79. The *Blouse* majority expressed that, in *Johnston*, the court held, when determining whether there was a search, an interest-balancing analysis is appropriate only in situations similar to *Terry v Ohio*, 392 US 1 (1968). *Blouse*, 611 A2d at 1178 n 1. See notes 43 and 105-11 and accompanying text for discussion of *Terry*.

36. The *Blouse* court analogized the compelling state interest of maintaining highway safety by keeping drunk drivers off the road in *Tarbert* to the compelling state interest of preventing "mass carnage" by keeping unlicensed drivers and unsafe vehicles off the road. *Blouse*, 611 A2d at 1179. See note 13 for further discussion of *Tarbert*.

37. *Blouse*, 611 A2d at 1179.

privacy is not subject to arbitrary invasions at the unbridled discretion of the police,[38] the supreme court concluded that systematic, non-discriminatory, non-arbitrary roadblocks and section 6308(b) of the Pennsylvania Vehicle Code, authorizing such roadblocks, are constitutional under the Pennsylvania Constitution.[39] Further, the court held that the police substantially complied with the *Tarbert* guidelines, and therefore, the manner in which they conducted the roadblock passed Pennsylvania constitutional muster.[40]

Justice Papadakos, while joining the decision, filed a concurrence expressing his apprehension that the police could get carried away and abuse their authority while conducting a mass detection investigation.[41] Papadakos acknowledged the public might have to succumb to the minimal intrusion of a traffic-check roadblock, but he maintained that the "public has a right to be free from abusive intrusion."[42]

Justice Flaherty, joined by Justices Zappala and Cappy, dissented, arguing that the supreme court in *Johnston* expressly limited the application of the interest-balancing approach to situations in which *Terry v Ohio*[43] is analytically similar.[44] Justice Flaherty said the Supreme Court of Pennsylvania found that the *Johnston* search lacked the exigency requirement of *Terry*, and therefore, the court rejected the interest-balancing analysis to determine if an unreasonable search and seizure occurred.[45] However, Flaherty continued, the supreme court did use a balancing test to determine whether a canine-sniff search necessitated usual warrant requirements.[46] Flaherty argued that the Supreme Court of Pennsylvania found that while, on balance, a canine-sniff search does not implicate full warrant requirements, nevertheless, the constitutionality of such a search is a function of the existence of probable

---

38. Id at 1178. See note 127 for the *Tarbert* guidelines.

39. *Blouse*, 611 A2d at 1180.

40. Id at 1180-81.

41. Id at 1181 (Papadakos concurring).

42. Id.

43. 392 US 1 (1968). In *Terry*, the United States Supreme Court held that, in exigent circumstances needing swift police action, warrantless searches are constitutional under the United States Constitution provided that two criteria are met. *Terry*, 392 US at 19-20. First, in weighing the government's interest against the individual's interest, the balance must tip in favor of the government. Id at 21. Second, the police must have specific and articulable facts leading to rational inferences that reasonably warrant the intrusion. Id.

44. *Blouse*, 611 A2d at 1181 (Flaherty dissenting).

45. Id at 1181.

46. Id at 1181-82.

cause.[47] Flaherty concluded that section 6308(b) of the Vehicle Code violates the Pennsylvania Constitution because it does not require reasonably articulable probable cause when conducting a traffic-check roadblock.[48]

This dissent raised two additional points. First, Justice Flaherty criticized the majority's reliance on the *Tarbert* dicta as precedential authority[49] and maintained that such gratuitous prose is no more authoritative than a group of law review articles penned by the various justices.[50] Second, the justice argued that the manner in which the police conducted the roadblock was exceedingly and unreasonably intrusive because they filled the roadblock area with distracting lights and confusing activity, and thus, disturbed the pastoral setting of a park at night.[51]

Justice Zappala, joined by Justices Flaherty and Cappy, also dissented, vigorously arguing that the Supreme Court of Pennsylvania rejected the interest-balancing approach in *Johnston*.[52] Instead, he argued, the absence of probable cause determines whether a search and seizure is unreasonable, and therefore, prohibited by the Pennsylvania Constitution.[53] Further, Zappala criticized the majority's reliance on the state's interest in ensuring highway safety in light of the nature of the cited Vehicle Code violations.[54] Finally, he noted concern over the dangerous and abusive extension of the majority position.[55]

---

47. Id at 1182.

48. Id.

49. Id.

50. Id.

51. Id.

52. Id at 1183. Justice Zappala, in his dissent, argued that the court in *Johnston* applied the United States Supreme Court dissenting opinion in *United States v Place*, 462 US 696 (1983). See notes 117 and 118 and accompanying text for brief discussion of *Place*.

53. *Blouse*, 611 A2d at 1183 (Zappala dissenting).

54. Id. Justice Zappala's dissent includes an addendum listing the violations discovered while the police conducted the roadblock:

1. Ten citations issued for license violations.
2. Three citations issued for inspection violations.
3. One citation issued for registration violation.
4. Five faulty equipment cards issued for no driver's license.
5. Four faulty equipment cards issued for no registration.
6. Two faulty equipment cards issued for state inspection.
7. One faulty equipment card issued for equipment violation.
8. One warning card issued for change of address.

Id at 1184.

55. Id at 1183. Justice Zappala noted the recent superior court decision in *Commonwealth v Metz*, 412 Pa Super 100, 602 A2d 1328 (1992), which he viewed as an "obliteration of a constitutional right." *Blouse*, 611 A2d at 1183. In *Metz*, the superior court affirmed a

To better understand the *Blouse* decision, one would benefit from looking at the history and jurisprudential development of search and seizure powers and their limitations. A broad search and seizure power first appeared in England after the advent of printing in 1476, when the British government increasingly sought to control seditious and nonconformist publications through the nation's publication licensing system.[56]

Widespread evasion of the licensing system in the years following led to increased government ordered censorship, harsher penalties, and the reaffirmation of virtually unlimited search powers.[57] The Secretary of State issued general warrants authorizing and directing law enforcement officers, at their own discretion, to search for and seize libellous publications.[58] General warrants, those that did not specify the place or persons to be searched nor the articles or persons to be seized, largely contributed to flagrant violations of personal rights.[59]

The American colonies, subject to the prevailing legal practices in England, profoundly resented the rigorous use and abuse of general warrants, known in the colonies as writs of assistance, to prevent their trading outside the English empire.[60] This profound resentment was one of the precipitating events of the American Revolution and the birth place of express constitutional limitations on the search and seizure power in the federal and state constitutions.[61]

---

lower court's refusal to suppress evidence seized as a result of a driver's refusal to submit to a traffic-check roadblock. Before reaching the roadblock checkpoint, the driver stopped, turned and drove away. The police chased and stopped the vehicle. The superior court concluded that attempting to avoid a systematic roadblock is reasonable grounds to suspect a vehicle code violation or criminal activity. *Metz*, 602 A2d at 1335.

56. Jacob W. Landynski, *Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation* 21 (Johns Hopkins Press, 1966). The government controlled publications, early on, by the crown through the royal prerogative and, later, by Parliament through legislation. Landynski, *Search and Seizure* at 21. Empowered officials had broad discretion to determine where to search and which publications were nonconformist. Id.

57. Id at 22. Penalties included the destruction of any press used for unlicensed printing. Id.

58. Edward C. Fisher, *Search and Seizure* 2-3 (Nw U, 1970).

59. Fisher, *Search and Seizure* at 3 (cited in note 58).

60. John Wesley Hall, Jr., *Search and Seizure* § 1.3 at 6 (Clark Boardman Callaghan, 2d ed 1991). General warrants were typically limited to searching for nonconformist publications and expired when the evidence was found. Writs of assistance, which were customs search warrants, did not expire until six months after the death of the issuing official. The general scope, long life, and the lack of a requirement to return seized articles contributed to serious abuses. Hall, *Search and Seizure* § 1.3 at 6.

61. Fisher, *Search and Seizure* at 6-7 (cited in note 58).

The constitutional limitation on the federal government's search and seizure power became part of the Constitution in 1791 as the Fourth Amendment,[62] but remained largely unexplored until *Boyd v United States*[63] in 1886.[64] The issue before the Court in *Boyd* was whether compulsory production of a person's private papers to be used as evidence against that person in a forfeiture proceeding was an unreasonable search and seizure within the meaning of the Fourth Amendment.[65] The Court, linking the Fourth and Fifth Amendments,[66] said that an unreasonable search and seizure, prohibited by the Fourth Amendment, is most often conducted to compel a person to give evidence against himself, which is prohibited by the Fifth Amendment in a criminal case.[67] While noting that the forfeiture of a person's property because of offenses committed by that person was civil in form, the Court, nevertheless, held that such forfeiture was criminal in nature.[68] The Court, recognizing no substantial difference between seizing a person's private papers and compelling that person to be a witness against himself,[69] held that compulsory production of a person's private papers to be used as evidence against him was violative of the Fourth Amendment.[70]

Twenty-eight years later in *Weeks v United States*,[71] the Court

---

62. Landynski, *Search and Seizure* at 42 (cited in note 56). The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

US Const, Amend IV.

63. 116 US 616 (1886).

64. Landynski, *Search and Seizure* at 49 (cited in note 56). The federal government accused the Boyds of violating federal revenue laws by importing a larger quantity of goods than what they were permitted. One of the statutorily authorized penalties was forfeiture. *Boyd*, 116 US at 617.

65. Id at 622. The government sought the production of an invoice to show the quantity and value of the previous shipment of lawfully imported goods. Upon the district court's order, the Boyds produced the invoice under protest and lost in the district court. Id at 618.

66. The Fifth Amendment of the United States Constitution, in pertinent part, provides: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law." US Const, Amend V.

67. *Boyd*, 116 US at 633.

68. Id at 633-34.

69. Id at 634.

70. Id at 638.

71. 232 US 383 (1914).

explicitly stated the federal exclusionary rule implicit in *Boyd*.[72] The issue in *Weeks* was whether evidence seized in a warrantless search of defendant's home by a federal marshal, incident to the warrantless arrest of defendant at his place of employment by local police officers, was an unreasonable search and seizure under the Fourth Amendment, and therefore, could not be used to aid the prosecution of defendant in the federal courts.[73] The Court, finding authority in the *Boyd* link between the Fourth and Fifth Amendments, said that to allow the federal government to profit from the fruits of illegal searches would be the same as striking the Fourth Amendment from the Constitution.[74] Noting that the Fourth Amendment applied only to the federal government, the Court held that property illegally seized by the federal government may not be used as evidence against the person from whom the property was seized, provided that the person seasonably requested the return of the property.[75]

The *Weeks* decision was extended in *Silverthorne Lumber Co. v United States*.[76] The issue presented in this case was whether the federal government may use copies of illegally seized documents as evidence against the persons from whom the originals were seized in a federal prosecution.[77] The Court said that the Fourth Amendment does not merely cover the physical possession of illegally seized items but also covers any knowledge acquired from the illegal seizure.[78] To allow otherwise, the Court continued, would re-

---

72. Landynski, *Search and Seizure* at 63 (cited in note 56).

73. *Weeks*, 232 US at 393. During defendant's warrantless arrest at his place of employment, police officers conducted a warrantless search of defendant's home and seized personal papers. Id at 386. The police gave the seized items to a United States Marshal who returned with the officers later that day, again without a warrant, to find additional evidence. Defendant sought to retrieve these illegally seized articles, but his petition was denied. Id at 387.

74. Id at 394.

75. Id at 398. The Court limited its holding to federal officials and did not evaluate the conduct of the police officers because they were not acting under federal authority. At this time the Fourth Amendment was applicable only to the federal government and its agencies. Id.

76. 251 US 385 (1920).

77. *Silverthorne*, 251 US at 391. While defendants were arrested and detained at their homes as a result of an indictment, federal officers, "without a shadow of authority," went to defendants' office and seized all their books and papers. Id at 390. The district attorney had the seized items copied. In response to defendants' seasonable petition, the district court ordered the return of the originals but impounded the copies. Using knowledge acquired from the copies, the district attorney framed a new indictment. Defendants refused to comply with the subsequent subpoenas and court order to produce the originals. Id at 391.

78. Id at 391-92.

duce the application of the Fourth Amendment to form over substance.[79]

In *Boyd* and *Weeks*, the articles that the respective defendants sought to be returned were private papers and documents. However the items sought by defendants in *Carroll v United States*[80] were contraband. The issue in *Carroll* was whether the warrantless search for and seizure of contraband articles in the course of transportation is prohibited by the Fourth Amendment.[81] The Court said that *Boyd* turned not on whether a reasonable search could be made without a warrant, but rather, on whether the government could seize private books and papers without a warrant.[82] The government, while not entitled to the possession of private papers, was entitled to possession of contraband goods.[83] The Court held that a warrantless search for and seizure of contraband goods located in a vehicle is reasonable, and therefore, permissible under the Fourth Amendment, provided that the search and seizure was predicated on probable cause.[84]

The *Boyd*, *Weeks*, *Silverthorne*, and *Carroll* line of cases primarily dealt with the fruit of searches and the use of such fruit. The next line of cases focused on the fruit pickers and the use of the fruit they have picked. *Byars v United States*[85] provided a convenient vehicle for the Court to reexamine the limitation in *Weeks* that the Fourth Amendment only applied to Federal action.[86] The issue before the Court in *Byars* was whether a federal agent's participation in a state initiated search violated the Fourth Amendment.[87] Noting that mere participation of a federal agent in

---

79. Id at 392.

80. 267 US 132 (1925).

81. *Carroll*, 267 US at 149. Without a warrant, but with probable cause, federal prohibition agents searched defendants' car, seized contraband alcohol, and arrested defendants. Id at 136. The National Prohibition Act authorized the governmental seizure and destruction of liquor. Id at 143. The Court found that under this act and a supplemental act, congress lessened search warrant requirements for property other than private dwellings, such as vehicles. Id at 147.

82. Id at 149.

83. Id.

84. Id. The Court defined probable cause as "the seizing officer's belief, reasonably based on circumstances known by the officer, that a vehicle contained contraband items subject to seizure and destruction. Id.

85. 273 US 28 (1927).

86. See note 75 and accompanying text.

87. *Byars*, 273 US at 32. Pursuant to a state issued search warrant, state officers searched defendant's property looking for evidence of a federal prohibition law violation. Id at 29. A federal prohibition agent assisted in the search as requested by the state agents. Id at 30. The warrant directed the search for liquor and instruments of liquor manufacture. Id

a state-initiated search does not make the search a federal undertaking, the Court cautioned that judicial vigilance should be the guide to detect circuitous violations of the Constitution.[88]

The state's use in a state trial of illegally seized evidence was challenged in *Wolf v Colorado*.[89] The issue before the United States Supreme Court was whether a state court conviction violated the Fourteenth Amendment's requirement of due process of law[90] because evidence admitted at trial would have been inadmissible in the federal courts as violative of the Fourth Amendment.[91] The Court determined that the Fourth Amendment's prohibition of unreasonable searches and seizures was fundamental to a free society and implicit in "the concept of ordered liberty."[92] Therefore, the Supreme Court held that the states were bound by the Fourth Amendment through the due process clause of the Fourteenth Amendment.[93] However, the Court recognized that there were a variety of methods to protect the individual from unreasonable searches and seizures[94] and did not bind the states to the exclusionary rule[95] with respect to evidence that state agents illegally seized.[96]

The tension between those who picked the fruit and those who may use the fruit continued in *Elkins v United States*.[97] Here, the Court reexamined the exclusionary rule to determine whether evi-

---

at 29. Counterfeit whiskey bottle stamps were discovered instead and were turned over to the federal agent. Id at 31. No state prosecution was ever pursued. Id. Defendant was tried and convicted in the federal courts for possession of the counterfeit stamps. Id at 28. However, the state issued search warrant clearly would not have withstood federal constitutional muster, if it had been issued by the federal government. Id at 29.

88. Id at 32. The Court determined that the federal officer actively participated in the search as an agent of the federal government, and therefore, the search and seizure violated the Fourth Amendment. Id at 33.

89. 338 US 25 (1949).

90. The Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

US Const, Amend XIV, § 1.

91. *Wolf*, 338 US at 25-26. See note 62 for text of the Fourth Amendment.

92. Id at 27.

93. Id at 27-28.

94. The Court noted the existence of common law actions to recover damages as a result of an illegal search, as well as statutory criminal sanctions and civil remedies. Id at 30-31 n 1.

95. See note 75 and accompanying text.

96. *Wolf*, 338 US at 33.

97. 364 US 206 (1960).

dence seized exclusively and illegally by state officers could be used in a federal criminal prosecution.[98] Acknowledging past admissibility of such evidence, but recognizing that federal courts must uphold judicial integrity and the Constitution, the Court held that evidence obtained by non-federal agents in violation of the Fourth Amendment was no longer admissible in a federal criminal trial.[99]

Revisiting its decision in *Wolf*[100] in *Mapp v Ohio*,[101] the Supreme Court reexamined whether evidence seized by a state agent in violation of the Fourth Amendment was admissible in a state criminal trial.[102] The Court noted that methods to protect privacy rights, other than the Amendment protection, have been largely futile.[103] Subsequently, the Court, abandoning its previous position in *Wolf*, reasoned that since the exclusionary rule was a fundamental part of the Fourth Amendment's right to privacy and since this amendment was binding on the states through the due process clause of the Fourteenth Amendment, the states were also bound by the exclusionary rule.[104]

The previous two lines of cases have largely looked at the parameters of the exclusionary rule with respect to illegally seized

---

98. *Elkins*, 364 US at 208. Defendants were convicted in federal court after moving to suppress evidence they asserted was illegally seized by state agents. Id at 206-07. The district judge, who assumed without deciding that the items were illegally seized, denied the motion on the grounds that federal agents had neither participated in, nor had knowledge of, the search prior to its execution. Id at 207.

99. Id at 223. The *Elkins* court looked to the eloquence of Justice Brandeis to illustrate the imperative of judicial integrity:

> Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

Id at 222-23 citing *Olmstead v United States*, 277 US 438, 485 (1928) (Brandeis dissenting).

100. See notes 89-96 and accompanying text.

101. 367 US 643 (1961).

102. *Mapp*, 367 US at 645-46. Police officers, without a warrant, arrived at defendant's home pursuant to information that a person wanted for questioning was hiding somewhere in defendant's home. Defendant, after contacting her attorney, refused to let the officers enter unless they produced a warrant. The police forced their way into defendant's home and defendant demanded to see their warrant. Id at 644. The police held up a piece of paper purported to be a warrant, defendant grabbed the paper, and the officers roughly handcuffed her for belligerence. Id at 644-45. The police conducted a widespread search of defendant's home and discovered obscene materials. No valid search warrant was ever presented in evidence and defendant was convicted in a state court. Id at 645.

103. Id at 651-52. The Court noted that less than half of the states had any criminal sanctions for illegal searches and seizures. Id at 652 n 7.

104. Id at 655.

evidence. In *Terry v Ohio*,[105] the Supreme Court examined the parameters that distinguished illegally seized evidence from that seized legally.[106] The issue before the Court in *Terry* was whether a police officer's search for concealed weapons to ensure his own safety was unreasonable under the Fourth Amendment when, although based on a belief that was something less than probable cause and conducted on a public street, the search was limited to the person's outer clothing.[107] Since this case did not deal with the warrant clause of the Fourth Amendment, the Court focused its inquiry on whether the search was unreasonable, and consequently, unconstitutional.[108] The Court, employing an interest-balancing analysis to determine the reasonableness of the search, balanced the need to search against the invasion that the search involved.[109] While acknowledging that any search, however limited, is a severe intrusion on a person's cherished personal security,[110] the Court, nevertheless, held that the government's interest in preventing crime combined with the heavy interest in protecting police officers from harm tipped the scale in the government's favor.[111]

The Supreme Court has largely looked to the Fourth Amendment of the United States Constitution in evaluating search and seizure limitations. However, in *Cooper v California*,[112] the Court

---

105. 392 US 1 (1968).

106. *Terry*, 392 US at 20-22.

107. Id at 19. A police officer observed Terry and two other individuals engaging in suspicious behavior that led him to believe they were "casing a job." Id at 5-6. After approaching the individuals and making inquiries, to which the men "mumbled" responses, the officer patted down the outside of the individuals' clothing. The officer discovered and seized concealed weapons. Terry's motion to suppress the weapons was denied. Id at 7-8.

108. Id at 20. The Court rejected the state's argument that a "stop and frisk" did not rise to the level of a "seizure and search." Id at 16. With respect to a "seizure," the Court said, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Id. With respect to a "search," the Court said, "it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.' " Id.

109. Id at 21.

110. Id 24-25. The Court described the search for weapons on a person in public as a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." Id at 17.

111. Id at 27. The Court concluded that a police officer may make a limited search of a person for weapons if a reasonably prudent person in the same circumstances would believe that his or another person's safety was in danger. Id.

112. 386 US 58 (1967). Defendant was convicted in a state court of selling heroin to a police informant. The police seized evidence, without a warrant, from defendant's car. *Cooper*, 386 US at 58. The car had been impounded in accordance with state law because of the crime for which defendant was arrested. Id at 61. The state court, while considering the search and seizure violation of the Fourth Amendment, held that the evidence was admissi-

recognized that, while bound by the Fourth Amendment through the due process clause of the Fourteenth Amendment, the states may afford more protection against searches and seizures under their own constitutions.[113] Accordingly, the Supreme Court of Pennsylvania has not hesitated to afford more protection to defendants under the Pennsylvania Constitution than is afforded under the United States Constitution.[114]

A divergence arose in the United States Supreme Court's interpretation of search and seizure limitations under the Constitution and the Pennsylvania Supreme Court's interpretation of search and seizure limitations under the Pennsylvania Constitution in the 1987 case of *Commonwealth v Johnston*.[115] The Supreme Court of Pennsylvania was faced with the issue of whether warrantless canine-sniff searches based on less than probable cause are prohibited under Article I, section 8 of the Pennsylvania Constitution.[116] The supreme court determined that a canine-sniff search is a "search" under Article I, section 8 and used an interest-balancing analysis to determine whether the search required a warrant.[117]

---

ble under the California Constitution because the search was a harmless error. Id at 59. The United States Supreme Court determined that the search was indeed permissible under the Fourth Amendment and never reached an evaluation under the California Constitution. Id at 62.

113. Id at 62. The Court stated this view to ensure the states understood that *Cooper* in no way abrogated the states' power to impose higher standards on searches and seizures. Id.

114. *Commonwealth v Sell*, 504 Pa 46, 470 A2d 457 (1983). The issue before the Supreme Court of Pennsylvania in *Sell* was whether Article I, section 8 of the Pennsylvania Constitution affords a defendant accused of a possessory crime "automatic standing" to challenge the admissibility of evidence alleged to be illegally seized. Prior to *Sell*, the United States Supreme Court had abolished "automatic standing" under the Fourth Amendment in *United States v Salvucci*, 448 US 83 (1980). *Sell*, 470 A2d at 458. The Supreme Court of Pennsylvania rejected the Supreme Court's reasoning in *Salvucci* and held that the search and seizure provision of the Pennsylvania Constitution still affords "automatic standing." Id at 469.

115. 515 Pa 454, 530 A2d 74 (1987).

116. *Johnston*, 530 A2d at 75. Defendant sought to suppress a quantity of marijuana seized pursuant to a search warrant that was predicated on a warrantless canine-sniff search of the area outside defendant's leased and enclosed storage area located in a commercial warehouse. Id.

117. Id at 79. The *Johnston* court looked to the majority and minority opinions in *United States v Place*, 462 US 696 (1983). The issue before the *Place* Court was whether a warrantless seizure of personal luggage to conduct a canine-sniff search that was based on less than probable cause was permitted under the Fourth Amendment. *Place*, 462 US at 697-98. The *Place* Court used an interest-balancing analysis to determine if a warrantless canine-sniff search was a "search" that was subject to Fourth Amendment restrictions. Id at 702-06.

The Pennsylvania Supreme Court rejected the *Place* Court's approach for application to the Pennsylvania Constitution and instead adopted the *Place* minority approach. *Johnston*,

The court noted that the usefulness of narcotics dogs would be lost if subjected to full-blown warrant procedures, and also, that arbitrary use of the dogs by the police threatened a free society.[118] Consequently, the court adopted a two-part test to determine whether a particular warrantless canine-sniff search was permissible under the Pennsylvania Constitution.[119] First, the police must be able to articulate reasonable grounds for believing drugs may be present.[120] Second, the police must have been lawfully present at the location where the canine-sniff search was conducted.[121]

Commonwealth v Tarbert[122] presented another issue that exemplified the continued tension between the government's interest in using search and seizure techniques as a law enforcement tool and the individual's interest in privacy. The issue before the Supreme Court of Pennsylvania in *Tarbert* was whether section 6308(b) of the Pennsylvania Vehicle Code, prior to its amendment in 1985,[123] authorized the police to conduct systematic roadblocks in order to stop and observe drivers to determine if those drivers were operating a vehicle while under the influence of alcohol, or alternatively, whether such roadblocks were permissible under Article I, section

---

530 A2d at 77-78. The *Place* minority, through Justice Brennan, noted that the "Fourth Amendment has already performed the constitutional balance between governmental interests and personal privacy, and *Terry* extended that balancing process only in special, limited circumstances." Id at 78 citing *Place*, 462 US at 718.

118. *Johnston*, 530 A2d at 79. While rejecting the *Place* majority rationale for holding that canine-sniff searches were not "searches" within the meaning of the Fourth Amendment, the *Johnston* court, nevertheless, adopted that rationale to evaluate whether full-blown warrant requirements were necessary to meet the mandate of Article I, section 8 of the Pennsylvania Constitution. Id.

The *Place* majority characterized a canine-sniff search as:

> much less intrusive than a typical search. . . . We are aware of no other investigative procedure that is so limited in both the manner in which the information is obtained and in the content of the information revealed by the procedure.
>
> Therefore, we conclude . . . that [the warrantless canine-sniff search] . . . did not constitute a 'search' within the meaning of the Fourth Amendment.

Id at 77 citing *Place*, 462 US at 707.

119. *Johnston*, 530 A2d at 79.

120. Id.

121. Id.

122. 517 Pa 277, 535 A2d 1035 (1987). The police, conducting a sobriety-check roadblock, stopped cars traveling in either direction and asked to see a license and registration in an attempt to gather clues that would lead them to believe the driver was intoxicated. An officer stopped defendant at this roadblock and, after gathering clues of intoxication, administered three field sobriety tests, two of which defendant failed. Defendant was arrested and given a breathalyzer test. He was convicted in the court of common pleas, but the superior court reversed the conviction on the grounds that the stop of defendant's vehicle violated Article I, section 8 of the Pennsylvania Constitution. *Talbert*, 535 A2d at 1036.

123. See note 14 for the statutory language before and after the amendment of 1985.

8 of the Pennsylvania Constitution.[124] The court, looking to the language of the Vehicle Code in force at the time of the roadblock at issue, said that the police department's power to stop vehicles was limited to situations where the police had "articulable and reasonable grounds" to suspect a vehicle code violation.[125] The court concluded that, since the police exceeded their statutory authority when they stopped the defendant without articulable and reasonable grounds for doing so, the evidence seized pursuant to that stop was illegally seized and inadmissible.[126] The court held that the state, under its police powers and as authorized by the new statute, may conduct systematic drunk-driver roadblocks that are constitutionally permissible, provided that the police substantially comply with the stated guidelines to minimize the intrusiveness of drunk-driver roadblocks.[127] Although the applicable statute did not authorize the police to conduct the roadblock at issue, the *Tarbert* court evaluated the constitutionality of drunk-driver roadblocks under Article I, section 8 of the Pennsylvania Constitution.[128]

The historical and jurisprudential journey of the government's search and seizure power and the limitations on this power provides adequate illumination from which to view the *Blouse* tapestry as a whole. However, understanding the dissonance between the *Blouse* majority and minority interpretations of *Johnston* and their disagreement over the use of *Tarbert* will raise the viewing light to a level at which we may also appreciate the threads that join to create *Blouse*.

The *Blouse* majority clearly held that systematic, non-discriminatory, non-arbitrary roadblocks used to ensure Pennsylvania highway safety by disclosing status violations were permissible under the Pennsylvania Constitution, and did so by balancing interests to determine reasonableness.[129] Writing for the majority, Justice Larsen midwifed *Blouse* from the marriage of *Johnston*

---

124. *Tarbert*, 535 A2d at 1037. See note 8 for Article I, section 8 of the Pennsylvania Constitution.

125. *Tarbert*, 535 A2d at 1044.

126. Id at 1045.

127. Id at 1043, 1045. The *Tarbert* guidelines focused on three areas: (1) the stop should only be momentary for a trained observation without physically searching the vehicle or its occupants; (2) unnecessary surprise should be avoided by marking the area and informing drivers of the roadblock's existence; and (3) arbitrariness should be minimized by requiring prior administrative decision to determine location, time, and an objective method of choosing which vehicles to stop. Id at 1043.

128. Id at 1037-43.

129. *Blouse*, 611 A2d at 1178.

and *Tarbert* in a marginally supported delivery.[130] The table upon which Justice Larsen delivered *Blouse* was supported by two legs from *Johnston* and two legs from *Tarbert*.

The first leg the majority gleaned from *Johnston* was a balancing test to evaluate a canine-sniff search that was based on less than probable cause.[131] Specifically, *Johnston* established a two-part test to decide the constitutionality of warrantless canine-sniff searches. First, the police must be able to "*articulate reasonable grounds for believing*" that drugs may be present in the place where the dog sniffed for drugs.[132] Second, the police must have been lawfully present at the place where they conducted the canine-sniff test.[133] The *Johnston* court determined the police met these requirements because they "*articulated a reasonable suspicion*" that drugs might be present in the area they subjected to a canine-sniff and the police were lawfully present.[134] The majority considered the phrases "reasonable grounds for believing" and "articulated a reasonable suspicion" as being synonymous and meaning something less than probable cause.[135] The *Blouse* minority, however, saw these phrases as expressions defining "probable cause."[136]

The heart of the dissonance over *Johnston* resides in the interpretation of what is "probable cause." The Pennsylvania Supreme Court and the United States Supreme Court have defined "probable cause"

> as being present where the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trustworthy information were sufficient to warrant a man of reasonable caution and belief to conclude that the suspect had committed or is committing a crime.[137]

In situations analytically similar to *Terry*, where an officer is per-

---

130. Justice Larsen, Chief Justice Nix, Justice McDermott, and a most reluctant Justice Papadakos comprised the majority. Id at 1178, 1181.

131. *Blouse*, 611 A2d at 1179.

132. *Johnston*, 530 A2d at 79 (emphasis added).

133. *Johnston*, 530 A2d at 79.

134. Id at 80 (emphasis added).

135. *Blouse*, 611 A2d at 1179.

136. In his dissent, Justice Flaherty wrote, "[t]he *Johnston* search . . . was subjected, not to a balancing test, but to a determination of probable cause. The police in *Johnston* had articulable facts on which they based their belief that" drugs were present. *Blouse*, 611 A2d at 1181 (Flaherty dissenting).

Justice Zappala, in his dissent, wrote, "[b]ecause there existed articulable facts upon which to base a finding of probable cause, Article I, section 8 of our State Constitution was not violated in *Johnston*." *Blouse*, 611 A2d at 1183 (Zappala dissenting).

137. *Commonwealth v Murray*, 460 Pa 53, 331 A2d 414, 417 (1975).

mitted to make a search predicated on a belief that is something less than probable cause,[138] the Pennsylvania Supreme Court has said that a "police officer must be able to point to specific and articulable facts which taken together with rational inferences from those facts reasonably warranted the intrusion."[139] The court characterized this level of belief as "reasonable suspicion" based on objective facts.[140]

As noted by Justice Zappala in *Commonwealth v Iannaccio*,[141] the Pennsylvania Supreme Court "has consistently interpreted Article I, [s]ection 8 of [the Pennsylvania] Constitution in parallel with federal court decisions under the Fourth Amendment of the United States Constitution, at least as to the meaning of 'probable cause.' "[142] Yet, the United States Supreme Court held,

> probable cause is a flexible, common-sense standard. . . . [I]t does not demand any showing that such belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.[143]

More confusing still is the recent decision in *Commonwealth v Kohl*[144] in which the Pennsylvania Supreme Court recognized that the Superior Court, in *Commonwealth v Quarles*,[145] correctly equated "reasonable grounds" with "probable cause."[146]

---

138. See notes 105-11 and accompanying text for discussion of *Terry*.

139. *Murray*, 341 A2d at 418.

140. Id.

141. 505 Pa 414, 480 A2d 966 (1984). Justice Zappala presented the court's opinion in support of affirmance in an evenly divided court. *Iannaccio*, 480 A2d at 968. Defendant sought to suppress evidence seized pursuant to a warrant issued based on a tip from a confidential police informant. Defendant asserted that the warrant did not meet the requirement of probable cause and he requested disclosure of the informant's identity to challenge the veracity of the informant's sworn statement. Id at 968-69. The trial court ordered the production of the informant. Id at 969-70. The Superior Court of Pennsylvania reversed the lower court's order finding that it "abused its discretion in finding as a fact that the Commonwealth failed to prove the existence of probable cause to justify the issuance of the warrant." Id at 970. The Pennsylvania Supreme Court, being equally divided, affirmed the Superior Court's order. Id at 968.

142. Id at 972 n 4.

143. *Texas v Brown*, 460 US 730, 742 (1983).

144. Pa , 615 A2d 308 (1992).

145. 229 Pa Super 363, 324 A2d 452 (1974).

146. *Kohl*, 615 A2d at 315-16. The supreme court in *Kohl* said the issue before the superior court in *Quarles* was the constitutionality under the state and federal constitutions of section 1547(a)(1) of the Pennsylvania Vehicle Code, which authorized seizure and search of bodily fluids where an officer has "reasonable grounds" to believe that the suspect had been driving under the influence of alcohol or a controlled substance. Applying "the basic principle of statutory construction that the Legislature does not intend to violate the federal or state constitutions," the Superior Court construed "reasonable grounds" to mean "proba-

Probable cause is obviously a very slippery concept.[147] The Pennsylvania Supreme Court, on one hand, appears to call the concept of probable cause by no other name other than "probable cause." On the other hand, in its attempts to define what "probable cause" actually is, the court treads confusingly close to definitions of "reasonable grounds" and "reasonable suspicion."

The second leg the majority used, also taken from *Johnston*, was the majority's distinction between two different types of determinations and the appropriateness of using a balancing test. The majority said that, in *Johnston*, the court rejected a balancing test to determine whether a "search" subject to constitutional limitations occurred because the *Johnston* search was not analytically similar to *Terry*.[148] The majority stated that the *Johnston* court held that a balancing test was appropriate to determine if full-blown warrant requirements were necessary, once it was determined that a constitutionally limited search did occur.[149] The *Blouse* minority rejected the majority's distinction and maintained that the only acceptable use of balancing was to determine whether a search that was analytically similar to *Terry* was reasonable.[150]

The *Blouse* majority is accurate when it states that the *Johnston* court used a balancing test to determine the constitutionality of

---

ble cause." *Kohl*, 615 A2d 315-16.

At issue in *Kohl* was whether section 1547(a)(2) of the Pennsylvania Vehicle code is constitutional under the federal and state constitutions when the statute authorized "the seizure and search of an individual's blood based solely on the fact that the police officer has reasonable grounds to believe the individual was operating a vehicle involved in an accident" resulting in injury or death. Id at 313. The supreme court distinguished the superior court decision in *Quarles* by noting that section 1547(a)(1) of the Vehicle code, at issue in *Quarles*, required "probable cause to believe that the suspect was driving under the influence of alcohol or a controlled substance." Id at 315. The supreme court, finding no such requirement in section 1547(a)(2), held that the tests authorized by section 1547(a)(2) were violative of the search and seizure provisions of both the federal and state constitutions. Id at 309-10.

147. *Black's Law Dictionary* defines "probable cause" as:

> [r]easonable cause; having more evidence for than against. A *reasonable ground for belief* in certain alleged facts. A set of probabilities grounded in the factual and practical considerations which govern the decisions of reasonable and prudent persons and is *more than mere suspicion* but less than the quantum of evidence required for conviction.

Black's Law Dictionary 1201 (West, 6th ed 1990) (emphasis added).

148. *Blouse*, 611 A2d at 1178-79 n 1 citing *Johnston*, 530 A2d at 79. The *Johnston* court found that the canine-sniff search at issue lacked the exigencies of *Terry*. *Blouse*, 611 A2d at 1178-79 n 1.

149. Id citing *Johnston*, 530 A2d at 79.

150. *Blouse*, 611 A2d at 1181 (Flaherty dissenting); Id at 1183 (Zappala dissenting).

canine-sniff searches.[151] However, the majority's interpretation of the reason why this test was used is questionable. The majority said that the balancing test is appropriate for determining the constitutionality of status-violation roadblocks "because the probable cause requirement would be wholly inadequate to satisfy the goal sought to be achieved, and there is no other way to obviate this type of harm."[152] Simply put, because the government's interest is heavy, the probable cause requirement is too burdensome. In the *Johnston* decision, however, the court used a balancing test to evaluate warrantless canine-sniff searches because "the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."[153] Here, the court uses balancing not just because the state's interest is great but also because the search at issue is a search like no other in its limited intrusiveness. A search conducted at a roadblock, not limited in the manner conducted and the content of information revealed but only limited in scope, can not seriously be compared to a canine-sniff search, which is a unique and maximally limited search. Perhaps if a dog could be trained to detect an expired license by smell, such a comparison would be warranted.

The third leg the majority relied upon was taken from *Tarbert*. The majority parallelled drunk-driving roadblocks, at issue in *Tarbert*, with roadblocks conducted to disclose status violations, at issue in *Blouse*.[154] Significant in *Tarbert* was the compelling interest of the public in apprehending drunk drivers, which the *Tarbert* court found to be relatively heavier than the minimal intrusion on the individual.[155] The *Blouse* majority, comparing the two types of roadblocks, said, "the state has a vital interest in maintaining highway safety by ensuring that only qualified drivers are permitted to operate motor vehicles, and that their vehicles operate safely" to prevent the "mass carnage that results from unlicensed

---

151. In *Johnston*, the court quoted the United States Supreme Court's balancing analysis of canine-sniff searches. *Johnston*, 530 A2d at 77 citing *United States v Place*, 462 US 696, 707 (1983).

152. *Blouse*, 611 A2d at 1179.

153. *Johnston*, 530 A2d at 77 citing *Place*, 462 US at 707 (emphasis added). "Sui generis" is defined as "[of] its own kind or class; *i.e.*, the *only one* of its kind; peculiar. *Black's Law Dictionary* 1434 (West, 6th ed 1990).

154. *Blouse*, 611 A2d at 1179.

155. Id referencing *Tarbert*, 535 A2d at 1041-42.

drivers and unsafe vehicles occupying the road."[156]

The *Blouse* majority's comparison was crucially weak in providing support to sustain the claim that status violations significantly contribute to the "mass carnage" on Pennsylvania highways. The *Tarbert* court, in contrast, cited cases indicating the large number of deaths and serious injuries attributed to alcohol-related accidents in Pennsylvania,[157] cited an analysis of the ineffectiveness of present law enforcement procedures to apprehend drunk drivers,[158] and also, cited a federal government study evaluating the effectiveness of sobriety-checkpoint programs.[159] Moreover, the brief for the Commonwealth in *Blouse* did not offer evidence to support the claim that status violations significantly contribute to the "mass carnage" on Pennsylvania highways,[160] and the majority merely glosses over this area.[161]

The fourth and final leg the majority used was its reliance on the *Tarbert* dicta.[162] The majority found that the *Tarbert* plurality upheld the constitutionality of drunk-driver roadblocks provided the police substantially complied with the prescribed guidelines.[163] The *Blouse* majority, failing to acknowledge that the constitutional analysis of drunk-driver roadblocks in *Tarbert* was dicta, held that the analysis carried significant authority.[164] The *Blouse* minority, through Justice Flaherty, criticized the majority's use of a gratuitously evaluated issue that was not properly before the court.[165] The Pennsylvania Supreme Court has said that language going beyond the issue decided must be considered dicta.[166] However, the

---

156. *Blouse*, 611 A2d at 1179.

157. *Tarbert*, 535 A2d at 1042. "*Commonwealth v Mikulan*, 504 Pa 244, 470 A2d 1339, 1341 (1983) (800 killed and 19,499 seriously injured in alcohol-related traffic accidents in Pennsylvania in 1982); *Commonwealth v Leninsky*, 360 Pa Super 49, 519 A2d 984, 989 (1986) (950 killed in alcohol-related traffic accidents in Pennsylvania in 1981)." *Tarbert*, 535 A2d at 1042.

158. Id citing Wayne R. LaFave, 4 *Search and Seizure: A Treatise on the Fourth Amendment* § 10.8(d) at 72-73 (West, 2d ed 1987).

159. *Tarbert*, 535 A2d at 1042 citing *Leninsky*, 519 A2d at 990-91 citing Natl Transportation Safety Bd, *Deterrence of Drunk Driving: the Role of Sobriety Checkpoints and Administrative License Revocations* (Washington, DC April 3, 1984).

160. Brief for Appellee at 4-5, *Commonwealth v Blouse*, 611 A2d 1177 (1992).

161. *Blouse*, 611 A2d at 1179. See also note 52 and accompanying text for Justice Zappala's criticism of the majority's reasoning in light of the "minute traffic and equipment violations" discovered in the *Blouse* roadblock. Id at 1183.

162. Id at 1179.

163. *Blouse*, 611 A2d at 1179. See note 127 for the *Tarbert* guidelines.

164. *Blouse*, 611 A2d at 1179.

165. *Id* at 1182 (Flaherty dissenting).

166. *Steelwagon v Pyle*, 390 Pa 17, 133 A2d 819, 823 (1957).

court has also held that dicta in an opinion can be "as strong and controlling as a decision on the merits; indeed, [o]pinions containing dicta are sometimes more carefully and thoroughly considered than some [o]pinions which are restricted solely to the merits."[167] In comparison, the *Tarbert* dicta, while extensively analyzing a constitutional issue not before the court, nevertheless lacks "strong and controlling" support because of the decision's plurality. Moreover, the *Tarbert* constitutional evaluation violates the "well-settled principle that [the Pennsylvania Supreme Court] should not decide a constitutional question unless absolutely required to do so."[168]

As described, the *Blouse* decision rests on four legs: (1) the majority's interpretation of probable cause; (2) its use of a balancing test where the probable cause requirement is inadequate to accomplish the goal of the state; (3) the parallel it draws between drunk-driver roadblocks and status-violation roadblocks; and (4) its reliance on *Tarbert* dicta. In so holding, Pennsylvania is not alone. A number of other states, including Connecticut, New Jersey, and New York, have found status-violation roadblocks constitutionally permissible as well.[169] These states generally have found such roadblocks permissible under their police powers and have minimized intrusiveness by prescribing guidelines similar to the ones in *Tarbert*.[170] The few states in which such roadblocks were held invalid generally did so by noting arbitrary police procedures in conducting the roadblocks.[171] It is interesting to note that states, when determining the constitutionality of drunk-driver roadblocks, generally cited the lack or existence of empirical data offered as evidence linking drunk driving with vehicle accidents and injuries.[172] In contrast, when determining the constitutionality of status-violation roadblocks, states, including Pennsylvania in *Blouse*, primarily relied on their police powers and prescribed guidelines to minimize the intrusiveness.[173] The connection between status violations and "mass carnage" on our nation's highways does not appear to be seriously questioned. Is this connection so much more obvious

---

167. *In Re Trust Estate of Paw*, 411 Pa 96, 191 A2d 399, 404 (1963), overruled on other grounds, *Estate of Tyler*, 474 Pa 148, 377 A2d 157 (1977).

168. *Krenzelak v Krenzelak*, 503 Pa 373, 469 A2d 987, 991 (1983).

169. See Annotation, *Validity of Routine Roadblocks by State or Local Police for Purpose of Discovery of Vehicular or Driving Violations*, 37 ALR4th 10 (1985).

170. Annotation, 37 ALR4th § 2[a] at 15.

171. Id.

172. Id at §§ 3, 4.

173. Id.

than the connection between drunk driving and vehicle accidents that we find it unnecessary to even glance at any empirical data?

Martin R. Egna